APPENDIX A

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

No. 90,569

[Filed February 8, 1999]

PUBLIC SERVICE COMPANY OF OKLAHOMA,)
)
Plaintiff/Appellee,)
vs.)
)
B. WILLIS, C.P.A., INC.,)
)
Defendant/Appellant.)

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE JAMES GOODPASTER, DISTRICT JUDGE

AFFIRMED

William T. Dickson,
Tulsa, Oklahoma, For Defendant/Appellant,

Stratton Taylor,
Claremore, Oklahoma,
Richard P. Hix,
Jon E. Brightmire,
Tulsa, Oklahoma, For Plaintiff/Appellee

OPINION

Carl B. Jones, Chief Judge:

¶1 Appellee Public Service Company of Oklahoma [PSO] commenced this condemnation action in 1992 to acquire part of a tract of land owned by Appellant accountancy corporation [Owner] for construction of a rail spur to move coal to one of PSO's power plants in Oologah. Appellant questioned whether the taking was truly for a public use, and filed exceptions to the report of the appointed commissioners. The trial court summarily denied the exceptions. Owner appealed.

¶2 In March 1995, construction of the rail spur was completed, and PSO's contract rail carrier began operating on the line. In late March, another division of this Court issued an opinion holding that Owner should have been allowed to conduct discovery and to have an evidentiary hearing on the issue whether the rail spur was devoted to a public use. Owner's attorney then wrote to both PSO and the railroad demanding they cease operations on the spur and stating that Owner planned to rebuild the fences and "restore the property to its original use." In response, PSO filed a "Petition for Permanent Injunction, Temporary Injunction and Temporary Restraining order Against [Owner]" in April, 1995, under the same case number as its eminent domain action. The new petition alleged, *inter alia*, that "since the time of the [Court of Appeals] ruling, [Owner] corporately and by and through its counsel has notified [PSO] to cease all use of the railroad

spur..." The trial court issued the requested temporary injunction. Owner did not appeal.

¶3 In June, 1997, the Oklahoma Supreme Court issued an opinion on certiorari to review this court's 1995 opinion. The Supreme Court held that Owner was entitled to discovery and a meaningful opportunity for hearing before PSO could condemn and occupy the property, and that both the trial court and this court were wrong to say that the allegation of necessity in PSO's petition was sufficient to shift the burden of persuasion to Owner on the matter of necessity for public use.[1] In September, 1997, Owner filed a motion to vacate the temporary injunction combined with a motion to dismiss the petition for injunctive relief and damages PSO had filed in 1995, and again wrote to PSO and the railroad threatening to rebuild the fence lines around the property and to post "no trespassing signs." The trial court denied both of Owner's motions, and granted it 45 days to conduct discovery in aid of the objections to the commissioners' report. The injunction previously issued was left in place pending the outcome of a hearing on Owner's objections.[2] From that order, Owner has brought the present appeal.

¶4 Owner's motion to vacate and to dismiss was filed over two years after entry of the injunction. Unless the order was void, Owner was limited to arguing that the order was entered because of "mistake, neglect or omission of the clerk," "irregularity in obtaining [the] order," or death of one the

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[1] / ***Public Serv. Co. v. Willis,*** 1997 OK 78, 941 P.2D 995. PSO had presented no evidence to establish necessity except to attach a copy of its board's resolution of necessity to a brief.

[2] / The trial court also denied Owner's application for injunction barring further operations on the rail line until the questions of public use and necessity were resolved.

parties before judgment. 12 O.S. 1991 §§ 1031 (Third), (Sixth); 12 O.S.Supp. 1993 § 1038. A void judgment, decree, or order may be vacated at any time on the motion of a party. 12 O.S. Supp. 1993 § 1038; see ***Stork v. Stork***, 1995 OK 61, ¶ 12, 898 P.2d 732, 738.

¶5 The trial court's decision whether or not to dissolve an injunction has been described as "to a certain extent, within the discretion of the court." ***Bourland v. Langford***, 36 Okla. 278, 128 P. 240, 240 (1912); see ***Cloer v. Gillespie***, 1963 OK 195, ¶ 12, 386 P.2d 1015, 1017. We infer from that statement that the propriety of the trial court's decision is partly a matter of law and partly a matter of fact. Absent a palpable abuse of discretion or clear showing of error, we must affirm the trial court's ruling to grant or undo injunctive relief. ***Cloer***, 1963 OK 195 at ¶ 12, 386 P.2d at 1018.

¶6 Owner contends that PSO'S 1995 petition seeking injunctive relief and damages should have been filed as a separate action. For that, he relies upon a distinction between "actions" and "special proceedings." In the oft-cited case ***Oklahoma City v. Wells***, 185 Okla. 369, 91 P.2d 1077, 123 A.L.R. 662 (1939), the court distinguished them: "Condemnation proceedings do not involve a tort. Strictly speaking they are not civil actions or suits. They are neither actions at law nor suits in equity. They are not proceedings according to the course at common law, but are special proceedings." *Id*, 91 P.2d at 1081. As a corollary, the courts have said that questions unrelated to public use and necessity of the taking or the value of the condemned property are beyond the jurisdictional power of the trial court in a condemnation case. *See* ***Burke v. Oklahoma City***, 1960 OK 29, ¶ 24, 350 P.2d 264, 269-70. In ***Burke***, the court said:

> "Our statutes prescribe the procedure for taking property by eminent domain, but do not provide that

> matters not germane to the issues involved may be litigated in the same action. The proceedings by the City are to condemn two tracts of land owned by the defendants ... [D]efendants are not entitled to litigate in this action alleged damages for [*sic*] property which was the subject matter of a previous condemnation proceeding which is not either directly or indirectly involved in the instant case and which the defendants have no interest in. If defendants are entitled to seek damages by virtue of the previous proceedings, their claim can only be litigated in a separate action."

Cf., ***Bowling v. State ex rel. BD. of County Comm'rs***, 1967 OK 121, ¶ 25, 428 P.2d 331, 337 (quoting ***Burke***).

¶7 The distinction discussed in ***Wells*** and numerous other cases was embodied in statutory law until 1984. Judicial remedies were divided into "actions" and "special proceedings." An "action" was defined as "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense," while "special proceeding" was used to describe all other remedies. 12 O.S. 1971 §§ 3-5 (*repealed*). In 1984, those sections were repealed by enactment of the Oklahoma Pleading Code, 12 O.S. Supp. 1984 §§ 2001 *et seq.*[3] Repeal did not, however, discard the distinction at law between actions and special proceedings.[4] Condemnation is still referred to as

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[3] / *See* Okla.Sess.Laws 1984, ch. 164 § 32.

[4] /Examples of other special proceedings are probate, ***Ray v. American Nat. Bank & Trust Co.***, 1997 OK CIV APP 66, 948 P.2d 1235, *cert denied*; judicial review of administrative orders, ***Pruitt v. State ex rel. Okla. Empl. Sec. Comm'n.***, 1996 OK CIV APP 33, 918 P.2d 80; an ouster petition following grand jury accusation, ***McCormack v. Town of Granite***, 1995 OK 105, 913 P.2d 278; insurance company receivership, ***State ex rel. Hunt v.***

a special proceeding strictly controlled by the constitution and governing statutes. ***Carter v. City of Oklahoma Cit6y***, 1993 OK 134, ¶ 12, 862 P.2d 77, 80.

¶8 There are three necessary elements of jurisdiction: jurisdiction of the subject matter; jurisdiction over the person; and jurisdictional power to render the particular judgment or decision in question. ***Reed v. Scott***, 1991 OK 113, ¶ 4, 820 P.2d 445, 447. Absence of any one of these elements, if apparent on the face of the judgment roll, renders the trial court's decision void, and therefore subject to vacation at any time. 12 O.S.Supp. 1993 § 1038; ***Stork v. Stork***, 1995 OK 61, ¶ 12 and n. 17, 898 P.2d 732, 738; ***Graff v. Kelly***, 1991 OK 71, ¶ 7, 814 P.2d 489, 492.

¶9 Owner invokes the special nature of condemnation proceedings to argue that the trial court lacked jurisdictional power to render injunctive relief in the condemnation case. Because the pleadings allowed in a condemnation action are limited to the petition, demand for jury trial, and objection to the commissioner's report, *see, e.g.*, ***Western Farmers Elec. Coop v. Willard***, 1986 OK CIV APP 5. ¶ 15, 726 P.2d 361, 364, *cert. denied*, Owner contends that a petition seeking injunctive relief in the same case was improper. On occasion, courts have stated that it is discretionary whether to permit additional pleadings in a condemnation case. *See* ***Incorporated Town of Pittsburg v. Cochrane***, 200 Okla. 497, 197 P.2d 287, 292 (1948); ***Rummage v. State ex rel. Dept. of Transp.***, 1993 OK CIV APP 39, ¶ 18, 849 P.2d 1109, 1112. Clearly, though, the additional pleadings cannot raise the core issued inherent in a condemnation case; nor can they require the trial court to decide extraneous issues. *See* ***Board of Comm'rs of Creek***

Green, 1973 OK 29, 508 P.2d 639; and proceedings to declare children delinquent, deprived, or neglected, ***Stratton v. Steele***, 1974 OK 10, 519 P.2d 468.

County v. Casteel, 1974 OK 31, ¶ 16, 522 P.2d 608, 610-11 (disapproving procedure of accepting answers to petition or to report objections; an answer "will not, in and of itself, raise any issue that can be determined in the proceeding ... [and] is insufficient to bring to issue the question of amount of damages or the necessity of the taking.").

¶10 In a related argument, Owner contends that, because PSO's second petition was filed during the pendency of Owner's first appeal, the trial court lacked jurisdiction to render the order, and the order consequently is void. For that, he quotes from ***Dooley v. Foreman***, 94 Okla. 163, 221 P. 47 (1923), which in turn cited ***Egbert v. St. Louis & S. F. R. Co.***, 50 Okla. 623, 151 P.228 (1915). The court in ***Egbert*** stated the rule:

> It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time, and, when a court has once had jurisdiction and lost it by appeal to another court, its authority to deal with the cause is suspended until jurisdiction becomes re-established. ... And if the trial court makes an order in the cause pending appeal which materially affects the rights of the parties it is null and void.

Id., 151 P. At 229 [citations omitted]. However, the rule is qualified: "[A]n appeal which is taken removes from the jurisdiction of the lower court only the matter involved in the judgment or order from which the appeal is taken. Other independent matters and collateral proceedings are not covered by the appeal, and the lower court remains its jurisdiction over them." ***Herbert v. Wagg***, 27 Okla. 674, 117 P.209, 211 (1911).

¶11 PSO contends that at the time of its second petition, it had a legal right to be on the property, following its tender into

court of the amount of damages reported by the commissioners, and that the trial court's order granting injunctive relief against Owner was a proper act related to enforcement of PSO's and/or its agent railroad to enter upon the property, construct and operate the spur line. PSO cites the case of ***Young v. Seaway Pipeline, Inc.***, 1977 OK 248, 576 P.2d 1144. In that case, while the trial court was considering the landowner's exceptions to the commissioner's report, the armed landowner threw the condemnor's workman and its counsel off the property. The trial court, at the condemnor's request, issued a temporary restraining order. The appellate court said, "Under the circumstances presented we cannot say that the trial court's decision to grant the temporary restraining order during the interim while the application for injunctive relief was being considered was anything but amply justified." *Id.*, 1977 OK 248 at ¶ 15, 576 P.2d at 1148.

¶12 ***Young*** involved no demonstrable jurisdictional challenge to the proper scope of orders which may be entered in the course of a condemnation case, and plainly did not involve any matter of jurisdictional power during the pendency of an appeal. Even so, when it is read in the context of ***Wagg***,[5] **Young** suggests that granting injunctive relief in aid of a party properly upon the condemned premises, to bar interference with its operations there, is not totally unrelated to the issues before the court in a condemnation case.

¶13 We hold that the trial court's order for relief to prevent Owner from rebuilding his fence lines across the condemned property and to forestall interference by Owner with operation

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[5] /PSO contends that ***Wagg*** was the source for Sup.Ct.R. 1.37(a)(7), 12 O.S.Supp. 1997, ch. 15, App., which states that after filing of a petition in error the trial court retains jurisdiction to "take action with respect to any issue collateral to a pending appeal." We merely note the similarity of the principal stated in ***Wagg*** and the appellate rule.

of the rail spur was a proper exercise of the trial court's jurisdiction. The court did not, as Owner attempts to characterize it, purport "to adjudicate PSO's right to appropriate [Owner's] property." After issuance of mandate in the prior appeal, the trial court was required to give Owner an meaningful, evidentiary hearing on the issues of necessity and public use, applying the appropriate burden-shifting rules. It was not required to undo *all* that had transpired before then. We therefore reject Owner's contention that the trial court lacked jurisdictional power to enter the order granting PSO's requires for injunctive relief.

¶14 Owner's other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. "Settled law of the case" is the doctrine of appeallate practice barring relitigation of issues which were finally settled by a previous appellate opinion or which were not timely raised during prior appellate proceedings. ***Barnett v. Barnett***, 1996 OK 60, ¶ 13 n. 13, 917 P.2d 473, 477; ***Jackson v. Jones***, 1995 OK 131, ¶ 12, n. 37, 907 P.2d 1067, 1074. The first appeal resolved only Owner's right to an evidentiary hearing, and the question whether PSO established a prima facie case of necessity by alleging necessity in its original petition. Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

¶ 15 For the reasons expressed in this opinion, we hold that the trial court did not exceed its jurisdiction by entering the order for injunction, and did not err by denying Owner's

motion to vacate. The order is affirmed.

¶ 16 AFFIRMED.

HANSEN, P.J. and ADAMS, J., concur.